Supreme Court, U.S.
FILED
01-66 MAY 10 2001

No. ——

IN THE

Supreme Court of the United States

THOMAS HOWARD, JR.,
Petitioner,

v

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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44 pp

QUESTION PRESENTED

Whether the trial court erred in denying Petitioner's Motion To Suppress evidence seized pursuant to a search warrant which search warrant was:

i) Issued by a Georgia Magistrate before the Affidavit and Application for the search warrant was submitted by the city detective/applicant. (The search warrant was issued before the Affidavit and Application for Search Warrant was made.)

ii) Requested and issued for a "single family" residence which, in fact, actually was, and is, a boarding house.

iii) Based upon an Affidavit and Application intentionally containing

1. Material misrepresentations concerning prior prosecutions of the suspect made with the intention of deceiving the State Magistrate that issued the search warrant.
2. No information about the criminal records of the informers which were in fact known to the applicant/officer.
3. No information about cash payments to informers which were actually paid to them by the applicant/officer.
4. No basis for the supposed knowledge of the informers containing instead the summary and conclusions of the applicant/officer.
5. Inherently conflicting information.
6. No details about each informers specific information, or statements, or the dates(s) acquired or the date(s) furnished or made to the city detective.

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IN THE

Supreme Court of the United States

No. ___

THOMAS HOWARD, JR.,

Petitioner,

v

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

The Petitioner, Thomas Howard, Jr., respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit affirming his conviction.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals (App. B-1, 2, 3) is unreported. The Eleventh Circuit Court of Appeals denied Petitioner's Petition For Rehearing (App. A-1) on February 9th, 2001. District Court for the Middle District of Georgia, Judge Louis Sands presiding, denied Petitioner's Motion To Suppress Evidence by Order (App. C-1-11) dated the 4th day of February, 2000.

JURISDICTIONAL STATEMENT

The Eleventh Circuit Court of Appeals entered its judgment on January 3rd, 2001 (App. B-1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On the 2nd day of April, 1999, at 2:00 o'clock p.m. City of Bainbridge, Georgia narcotics agent David Kirkland obtained a search warrant for a "single family residence" at 106 Love Street, Bainbridge, Decatur County, Georgia. Five minutes later, at 2:05 o'clock p.m. agent Kirkland took an oath and signed the Affidavit and Application for Search Warrant in connection with the Search Warrant which had already been issued to him.

A week later on April 9, 1999 the "boarding house" located at 106 Love Street, which Petitioner Howard shared with several other renters was searched and Howard was arrested for violating the Georgia Controlled Substances Act. Federal charges were initiated later and Howard was prosecuted in the U.S. District Court Middle District of Georgia.

Petitioner filed a Motion To Suppress contending 1) the search warrant was improperly issued before the affidavit and application for search warrant were sworn to and presented to the magistrate, and 2) the affidavit contained intentional misrepresentations intended to deceive the magistrate as well as conclusory, and stale information and 3) material information was deliberately withheld from the magistrate concerning the criminal records of the informer(s) and cash payments made by the law enforcement officers to the informer(s). After a hearing in which the burden was on

Howard, the trial court denied the motion. (App. C) Appellant was tried by a jury, convicted and sentenced.

Petitioner took a timely appeal of the suppression issue to the Eleventh Circuit Court of Appeals which affirmed the trial court in an unpublished one-half page opinion. (App. B)

REASONS FOR GRANTING THE PETITION

The decision of the trial court, affirmed by the Circuit Court of Appeals in an unpublished opinion, conflicts not only with the clear, unambiguous, mandate of the Fourth Amendment of the United States Constitution but also with decisions of other jurisdictions.

Petitioner is not aware of any single jurisdiction which has approved, sanctioned, or condoned the issuance of a search warrant before sworn probable cause is established to the issuing magistrate. Yet that is exactly what this case presents.

The unassailable truth, truth that even the government did not deny, and cannot deny, follows.

The form denominated "SEARCH WARRANT IN THE MAGISTRATE COURT OF DECATUR COUNTY STATE OF GEORGIA" is signed and dated, including the time, by the Magistrate on the 2nd day of April, 1999, at 2:00 o'clock p.m. (App. Y-2; Exhibit "Y", hearing on Defendant's motion to suppress)

The form denominated "AFFIDAVIT AND APPLICATION FOR A SEARCH WARRANT IN THE MAGISTRATE COURT OF DECATUR COUNTY STATE OF GEORGIA" is *not* sworn to and signed by Narcotics Agent David Kirkland until 2:05 p.m. on the 2d day of April, 1999, that is five (5) minutes *after* the search warrant has already been issued by the magistrate. (App. Z-2; Exhibit "Z", hearing on Defendant's motion to suppress)

Both instruments are forms using standard language with blanks to be filled in as applicable by the applying officer.

Officer Kirkland prepared the Search Warrant form and the Affidavit and Application for Search Warrant form and presented them to the magistrate.

The Fourth Amendment to the Constitution of the United States provides "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, *and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched*, and the persons or things to be seized." (italics added).

The warrant in this case was issued before the affidavit and application was sworn to and subscribed by the applying officer.

This is no mere technicality. This is the soul, the very core, of the Fourth Amendment. Establish probable cause to the magistrate first. Then, and only then, do you get your search warrant. The problem is there are magistrates with a Will Rodgers mentality, they never meet a search warrant (or application therefore) that they do not like. Has anyone ever heard of a magistrate declining to issue a search warrant? No. It is just such casual disdain for the Bill of Rights that leads to search warrants being issued before the application is complete.

If the magistrate is required to, and actually does, make an independent determination of probable cause based on the evidence presented before a search warrant is issued, the factual situation presented in this case can not and will not occur. If this is not the requirement of the law, then let us take down the law books in which *United States v. Hawes*, 529 F. 2d 472, 480 (5th Cir. 1976); *United States v. Harris*, 403 U.S. 573 (91 S.Ct. 2075, 29 L.Ed.2d 723) (1971); and *Page v. State*, 136 Ga.App. 807 (222 S.E.2d 661) (1975) are published and rip those cases out.

Destroy them. Forever and always ignore them as having application to any case. Might as well toss out the Fourth Amendment while we are at it. ". . . and no warrants shall issue, but upon probable cause, supported by oath or affirmation . . ."

Hawes, supra, page 480, citing *Harris*, *supra*, specifically states,

> "Before a valid warrant may issue, an affidavit must be submitted to the court setting forth the necessary facts and circumstances whereby the judge may determine probable cause."

The affidavit must be submitted **"BEFORE A VALID WARRANT MAY ISSUE"**.

In *Page*, *supra*, the Georgia court said,

> "It is incumbent upon a magistrate to make an independent determination of probable cause before he issues a search warrant. In *Reid v. State*, 129 Ga.App. 660 (200 S.E. 2d 456) (1973) we held an affidavit, sufficient both as to form and content, could not support a search warrant where the issuing magistrate testified that he had not made any decision from reading the sheriff's affidavit but had signed the warrant after ascertaining that the sheriff was sworn and his affidavit was signed. . .
>
> Probable cause to support a warrant must be determined by a neutral magistrate before the warrant is issued, not by a reviewing court's retrospective evaluation of the evidence. The testimony given by the issuing justice of the peace demonstrates that no such determination was made. This is no mere technical irregularity but rather a fatal defect in the warrant thus issued."

In this case we do not need the magistrate to testify. We have the written documents that show on their face the warrant was issued before the affidavit was sworn to and signed by the officer. The Georgia Court in *Reid*, *supra*, and

Page, *supra*, both said this is no mere technical irregularity. Remember too, this is a Georgia magistrate, with a Georgia law enforcement officer seeking authorization to search a Georgia Defendant's Georgia residence.

And this is not the only *mere Fourth Amendment technicality* which exists in this search warrant. Another unassailable truth, truth the government can not contest follows.

The Search Warrant described the place to be searched as "a single family dwelling" when, in fact, it is a boarding house occupied by several named persons. The persons named in the search warrant as being located at the residence are Tommy Howard, Eddie Freeman, Brenda Porter, Dorothy Battle, and a black male named Nathaniel. In addition to the foregoing, Defendant Howard testified that persons renting a room there included Nathaniel Borden and Lester Bailey.

Remember the requirement of the Fourth Amendment that the place to be searched be "particularly described"? Here the particular description for the boarding house at which several unrelated named persons paid rent and lived was for a "single family residence". The affidavit and application for search warrant and the search warrant (Respectively, App. Z and Y, Exhibits "Z" and "Y", hearing on Defendant's Motion to Suppress) clearly and unequivocally describe the premises to be searched as a "single family residence". However, testimony just as clearly and unequivocally establishes the premises searched are in fact a "boarding house" with rooms rented and occupied by no less than six people (T-Vol. 4 page 52, 78, 94, 109, 158, 159, 160; T-Vol. 5 page 5, 9.)

At the hearing on the Motion To Suppress, Petitioner proved that Officer Kirkland submitted a **BALD-FACED LIE** to the magistrate in the Affidavit and Application for Search Warrant (App. Z; Exhibit "Z"), specifically Attachment A to the said instrument. It is Attachment A that is intended to establish probable cause.

City of Bainbridge Narcotics Detective Kirkland wrote in his affidavit. . . .

> "Funderburke stated that **Howard had been arrested on three occasions and had been found not guilty, because Howard would never be in the room where the narcotics were found.** Kirkland opened the investigation by first researching the prior cases that had been made against Howard." (App. Z-3; Exhibit "Z", attachment A)

When Kirkland made the above representations to the magistrate, supposedly under oath, Kirkland knew the truth about the three prior prosecutions of Defendant Howard. Kirkland knew two of the three prosecutions involved alleged hand to hand sales of a controlled substance to law enforcement officers and the third prosecution involved a controlled substance being found on the back porch of a residence in which Howard lived together with a single-edged razor which had a residue of cocaine on the blade and a fingerprint was imbedded in the residue which fingerprint was not that of Howard. None of the foregoing details were reported to the magistrate though they were all known to Kirkland at the time he prepared the Affidavit and Application for Search Warrant and submitted same to the magistrate. (T-Vol. 3, page 25-27) Kirkland knew the truth but instead of telling it he chose to misrepresent. He chose to deceive the magistrate.

The trial court in its order (App. C-6) held, "The court finds that the information included in the search warrant pertaining to Defendant's prior prosecutions was intentional."

The significance of Kirkland's deceit is four fold, at least. First, Kirkland is seeking to obtain a search warrant for a **boarding house** (though he falsely labels it a single family residence) which rents out rooms. He deliberately presents to the magistrate a false picture that he has researched the previous prosecutions and Howard has been acquitted three

times because Howard is never caught in the room where the narcotics are found. Secondly, through the use of the three previous unsuccessful drug prosecutions Kirkland is seeking to establish Howard to be a career drug dealer, who just happens to be lucky enough not to be in the room where the drugs are found. Thirdly, this suggests that Howard deals drugs from his house, a theme that the rest of his sworn affidavit pursues. This entire series of lies *sets the table* for the rest of the allegations in the affidavit for the purpose of establishing probable cause. This whole presentation to the magistrate is for the purpose of establishing probable cause, if the magistrate cares. The fourth, and most telling, element of significance about Kirkland's deceit, is that it shows his total lack of personal credibility and casts a cloak of doubt over every thing else contained in his *sworn affidavit*. He has clearly, unambiguously, and indelibly established his penchant for misrepresentation. Such matters clearly bear upon the issue of probable cause the magistrate is supposed to be deciding. And that is why the misrepresentations were made—to establish probable cause. And, there is more such slight of hand yet to come from Kirkland in this affidavit.

The paragraph in the Affidavit and Application beginning on the top of page 2 (App. Z-4) begins, "The next paragraph is a summary of statements given to the Affiant [Kirkland] by 12 Confidential Reliable Informants about the ever-changing on-going business of distributing illegal narcotics by Tommy Howard from the residence of 106 Love Street in Bainbridge, Decatur County, Georgia." Kirkland, the deceiver, the misrepresenter, supposedly then summarizes the combined statements of the 12 informants. Kirkland's summary is nothing more than Kirkland's conclusions, Kirkland's opinions. There is no way for the magistrate to make an independent determination about the reliability of the informants or the information provided by the informants. Furthermore, there is no indication whatsoever about when such representations were made to Kirkland nor is there any

indication or representation concerning the informer's basis of knowledge, either collectively or individually. What is admittedly provided is Kirkland's collective summarization.

According to Kirkland's conclusory summary,

> "the only conflicting information among the informants was the type of cocaine Howard sold and how it was packaged. Some informants stated Howard only sold "crack cocaine" unwrapped or wrapped in tin-foil. Other informants stated Howard only sold powder cocaine packaged in small clear plastic ziplock [sic] bags."

How many informers said only crack cocaine? How many informers said only powder cocaine? How many said only unwrapped cracked cocaine? How many said only crack cocaine wrapped in tin-foil? When did they say these things? What is the basis of their information? When did they acquire their information? How did they acquire their information? This is a clear demonstration of inherent **UNRELIABILITY** which shows a lack of accurate information upon which to base probable cause.

According to Kirkland's conclusory summary, "The informants relayed information that they never knew where Howard would go to get the narcotics, but it would be in one of the rooms in the house. Each CI stated that Howard would move the narcotics on a regular basis from room to room to intervene in the investigative efforts by police." (App. Z-4) If the informants didn't know where Howard would go to get the narcotics how did they know the narcotics were moved on a regular basis from room to room? Who said that? When did they say it and what is the basis for their information? Neither we, nor the magistrate, know the answers to such basic questions which are foundational to the acceptance of the information as determining probable cause.

It is impossible for the magistrate to make an independent determination about the existence of probable cause when all that is presented is the officer's conclusions. The Fourth Amendment explicitly commands that "no warrants shall issue, but upon probable cause." Case law has established the further requirement that the warrant be issued by a "neutral and detached magistrate," who must actually determine whether probable cause for a search exists. *Johnson v. United States*, 333 U.S. 10, 13-14 (68 S.Ct. 367, 92 L.Ed. 2d 436) (1947); *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (92 S.Ct. 2119, 32 L.Ed. 2d 783) (1972). The *Johnson*, *supra*, court observed,

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law en- [333 U.S. 10 , 14] forcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

This precise point is in fact reiterated by the Supreme Court in the landmark case *Illinois v. Gates*, 462 U.S. 213, 240 (103 S. Ct. 2317, 76 L. Ed. 2d 527)(1983) in which this court replaced the "two-prong test" established in *Aguilar v. Texas*, 378 U.S. 108 (84 S. Ct. 1509, 12 L. Ed. 2d 723)(1964) and *Spinelli v. United States*, 393 U.S. 410, (89 S. Ct. 584, 21 L. Ed. 2d 637) (1969) with a "totality of the circumstances test". What continues to be required is that the magistrate make the legal determination about the existence of probable cause independent of the law enforcement officer.

And what about the criminal records that some of the informers have. Did this sworn law enforcement officer, Kirkland, tell the magistrate about the criminal records of his informers. Again, the short answer is—**NO!** In his testimony under cross examination at the hearing on the motion to

suppress, Kirkland testified that the magistrate was not advised of the criminal records of the informers, nor was the magistrate advised that some of the informers were paid. (T-Vol. 3, page 28)

One actually interested in the extent of Kirkland's deceit, the continued slight of hand herein earlier referred to, might ask about the lack of any indication by Kirkland of reliability or veracity of CI 98059. Kirkland did not, at the end of the affidavit where this specific informer's activities are discussed, mention any prior information, seizures, or arrests caused or contributed to by CI 98059. Nevertheless Kirkland in his sworn testimony claims that CI 98059 was one of the twelve informers he was including in the summary contained on page two of the affidavit. (T-Vol. 3, page 28-29) Of course, there is absolutely no way the magistrate could possibly know this from her reading of the Affidavit and Application for Search Warrant, if she read it.

So, what we have is all the material, relevant, essential details about the investigation are deliberately withheld from the one and only person charged with the responsibility to make the all important determination of probable cause for the issuance of a search warrant. And, in lieu of such honest, truthful, forthright and complete information from the sworn law enforcement officer, the magistrate is presented with the officers conclusions, trickery and slight of hand.

Notice the nearly complete absence of details about when an informer spoke to Kirkland, when Kirkland spoke to another officer, or when Kirkland attempted controlled buys from Howard. By summarizing and leaving out details about time, possible questions concerning stale information are glossed over, lost, and ignored. The deliberate effect of which was to limit the magistrate's ability to determine probable cause. This is not accidental. This is an experienced law enforcement officer intentionally misrepresenting, distorting, shading, and withholding the truth.

Though the trial court found Kirkland intentionally misrepresented the information about Howard's prior prosecutions, the Court held Howard did not prove the Magistrate relied on such statements to establish probable cause and Howard's Motion To Suppress was denied.

In *U.S. v. Park*, 531 F.2d 754 (5th Cir. 1976) it was held that if a misrepresentation in an affidavit for a search warrant is made with the intention of deceiving the magistrate it will invalidate the warrant regardless of whether the error is material to the showing of probable cause. Yet the trial court and the Eleventh Circuit Court of Appeals both ignored the rule in *Park*.

The trial court placed the entire burden on Petitioner in connection with the Motion To Suppress. In *U.S. v. Rodgers*, 442 F.2d 902 (5th Cir. 1971) it was held that the prosecution must bear the burden of persuasion with regard to probable cause. Furthermore, under Georgia law the burden of proof is unquestionably on the State. O.C.G.A. 17-5-30, *Davis v. State*, 266 Ga. 212 (465 S.E.2d 438)(1996).

Petitioner submits that even if the burden was on Petitioner to show the officer's intentional misrepresentation was material to a finding of probable cause *Franks v. Delaware*, 438 U.S. 154 (98 S. Ct. 2674, 57 L. Ed. 2d 667 (1977) clear and convincing evidence to that effect was produced. Petitioner's Motion To Suppress should have been granted.

CONCLUSION

Based upon the search warrant being issued before probable cause on oath was presented to the issuing magistrate as well as the intentional misrepresentations and unsupported conclusory allegations and material information being withheld from the magistrate, and the burden being improperly placed upon Petitioner to prove the lack of probable cause the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Feb. 9, 2001]

No. 00-13028-FF

UNITED STATES OF AMERICA,
Plaintiff-Appelee,

versus

THOMAS HOWARD, JR.,
a.k.a. Tommy Howard, Jr.,
Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Georgia

BEFORE: EDMONDSON, HULL and HILL,
Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

/s/ James C. Hill
JAMES C. HILL
UNITED STATES CIRCUIT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Jan. 3, 2001]

No. 00-13028

District Court Docket
No. 99-00003-CR-3-WLS-6

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

THOMAS HOWARD, JR.,
a.k.a. Tommy Howard, Jr.,
Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Georgia

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion, included herein by as the judgment of this Court.

Entered:	January 3, 2001
For the Court:	Thomas K. Kahn, Clerk
By:	McCombs, Elaine

Filed at 8:43AM
March 5, 2001
/s/ Helen F. Newberry
HELEN F. NEWBERRY
Deputy Clerk, U.S. District Court
Middle District of Georgia

FILED
U.S. DISTRICT COURT
MIDDLE GEORGIA
01 MAR-7 AM 9:28

/s/ Brenda J. Littleton
BRENDA J. LITTLETON
Deputy Clerk

This 6th day of March, 2001

/s/ Illegible
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Jan. 3, 2001]

No. 00-13028
Non-Argument Calendar

D.C. Docket No. 99-00003-CR-3-WLS-6

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

THOMAS HOWARD, JR.,
a.k.a. Tommy Howard, Jr.,
Defendant-Appellant.

Appeal from the United States District Court for the
Middle District of Georgia

(January 3, 2001)

Before EDMONDSON, HULL and HILL, *Circuit Judges.*

PER CURIAM:

Appellant Thomas Howard was indicted and convicted by a jury on three counts of drug possession. On appeal, he raises two issues: (1) whether the trial court erred in failing to grant his motion for a directed verdict of acquittal at the close of the government's case; and (2) whether the trial court erred in failing to grant his motion to suppress.

Upon careful review of the record, the briefs of the parties and the arguments contained therein, we conclude that the

evidence was sufficient to prove Howard guilty beyond a reasonable doubt and that sufficient probable cause supported the search warrant. Therefore the district court did not err in denying Howard's motion for judgment of acquittal and his motion to suppress. The judgment of the district .court is

AFFIRMED.

A True Copy—Attested:
Clerk, U.S. Court of Appeals
Georgia Circuit

By /s/ Illegible
Deputy Clerk
Atlanta Georgia

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

[Filed Feb. 4, 2000]

(6:99-CR-3-3 (WLS)

UNITED STATES OF AMERICA,

v.

THOMAS HOWARD, JR.
aka TOMMY HOWARD, JR.,
Defendant.

ORDER

Presently pending is Defendant's Motion to Suppress. For the reasons discussed below, the above-mentioned motion is hereby denied.

FACTUAL AND PROCEDURAL HISTORY

1. On January 21, 2000, a hearing was held in this matter.
2. At the hearing, Defendant's counsel testified that the warrant in this case included information about three prior prosecutions involving Defendant.
3. Defendant's current counsel represented Defendant in each of those prior prosecutions.
4. Defendant's counsel testified that the information pertaining to the prior prosecutions included in the search warrant in this case was false.
5. Specifically, the information in the warrant that Defendant's counsel makes reference to provides:

Funderburke advised Affiant that Howard had been investigated on other occasions where large quantities of cocaine had been seized. Funderburke stated that Howard had been arrested on three occasions and found not guilty, because Howard would never be in the room where the narcotics were found. Affiant opened the investigation by first researching the prior cases that had been made against Howard.

6. Agent David Kirkland ("Kirkland") is the officer who investigated this case. He stated that, in 1997, Larry Funderburke, Director of Public Safety instructed him to open an investigation of Defendant.

7. On April 2, 1999, Kirkland submitted an affidavit for a search warrant to the magistrate judge of Decatur County, Georgia.

8. He admitted that he included information pertaining to Defendant's prior prosecutions in his affidavit to obtain a search warrant.

9. He further testified that he was familiar with the specific details of those prior prosecutions, and that the information about those prior prosecutions was the opinion of Funderburke,

10. Agent Kirkland also admitted that he did not include in his affidavit that one of the 12 (twelve) informants used to obtain information about the Defendant was paid $150.00.

11. Agent Kirkland testified that the omission was not done deliberately or intentionally.

12. Moveover, Agent Kirkland further admitted that he did not include in the affidavit that some of the informants had criminal backgrounds.

13. Kirkland testified that he did not intentionally withhold information from the magistrate.

THE AFFIDAVIT\WARRANT

11. In obtaining the search warrant in the instant case, Kirkland submitted an affidavit for a search warrant to a magistrate judge of the Magistrate Court of Decatur County, Georgia.

14. By affidavit, Kirkland stated that he began investigating Defendant in 1997.

15. In that affidavit, Kirkland further staled that he relied upon 12 (twelve) reliable informants in obtaining information about the Defendant.

16. Kirkland also provided that the informants had previously led to the arrest of other persons in the business of distributing illegal narcotics.

17. He further provided that each informant had their own source of knowledge about the Defendant, and that each informant was individually interviewed.

18. He also stated that Defendant's name was never mentioned by him to the informants until the informants first mentioned the Defendant's name.

19. Moreover, Kirkland stated that the information provided by each informant was consistent.

20. Some of that information provided by each informant included the street address, 106 Love Street in Bainbridge, Georgia (also described as the first house on the right after turning off West Street onto Love Street traveling East); the location in that residence where the purchase of the narcotics occurred; the manner in which the Defendant would meet the person wishing to purchase narcotics; the limits placed on how far a person could go into the house; the regularity in which Defendant moved the narcotics within the house; the amount of cocaine as perceived by the informants; and their knowledge of a weapon that was kept on the premises.

21. He affied that the only conflicting information pertained to the type of cocaine Defendant sold and how it was packaged.

22. According to Kirkland, some informants stated Defendant only sold crack cocaine unwrapped or wrapped in tin-foil, while other informants stated Defendant oily sold powder cocaine packaged in small, clear, plastic ziplock bags.

23. Additionally, Kirkland provided that part of his information was obtained through his personal observation and corroborative research.

24. Kirkland stated there were two occasions where an undercover agent went along with an informant in an attempt to purchase narcotics from Defendant.

25. He provided that Defendant would not sell to the informant while the undercover agent was present.

26. He further provided that the informant later returned to the residence at 106 Love Street and subsequently was allowed to purchase narcotics. Kirkland stated that he accompanied the informant back to the house on those two occasions and witnessed the informant purchase the cocaine.

27. Kirkland also asserted that he relied upon information about the Defendant obtained from a fellow investigator, Frank Green ("Green"). Green advised Kirkland that he had talked with several informants about Defendant, and that he had received basically the same description of Defendant's narcotic business.

28. Kirkland stated that he researched Defendant's residence and the vehicles at that rcsid4nce. The information obtained from Kirkland's research was consistent with the information obtained from the informants pertaining to the residence and its surrounding.

29. He stated that he observed that Defendant's resident was preceded by an empty lot, and said residence displayed the number 106 over the front porch.

30. He also stated that he noticed Defendant's truck and blue Cutlass were found at said residence on several occasions.

31. Kirkland asserted that he worked directly with a confidential informant identified as CI 98059 in the investigation of Defendant. He stated that this informant had visited Defendant's residence fifteen times to gather information for this investigation.

32. At the suppression hearing, Kirkland stated that CI 98059 was one of the twelve informants referred to in the affidavit for a search warrant.

33. He further stated that seventy-two hours prior to obtaining the search warrant, CI 98059 had been to Defendant's residence and witnessed Defendant sell crack cocaine.

DISCUSSION

At issue is the validity of a search warrant. Essentially, three questions are before the Court. First, whether statements included in Kirkland's affidavit for a search warrant were false and were provided intentionally or with a reckless disregard for the truth and whether such statements were essential to a finding of probable cause. Second, whether certain omissions about the informants were intentionally or recklessly excluded and whether such omissions were essential to a finding of probable cause. Third, whether the warrant included such legally sufficient information to support a finding of probable cause for issuance of the search warrant.

I. STATEMENTS INCLUDED IN THE AFFIDAVIT PERTAINING TO DEFENDANT'S PRIOR PROSECUTIONS

Defendant argues that in obtaining a warrant to search Defendant's home, Kirkland included in his affidavit for the search warrant false information pertaining to Defendant's prior prosecutions. The information or language that Defendant makes reference to is as follows:

> Funderburke advised Affiant that Howard had been investigated on other occasions where large quantities of cocaine had been seized. Fundethurke stated that Howard had been arrested on three occasions and found not guilty, because Howard would never be in the room where the narcotics were found. Affiant opened the investigation by first researching the prior cases that had been made against Howard.

See Affidavit of David Kirkland.

Defendant contends that if that information influenced the magistrate in determining probable cause to issue the search warrant, the issuance of the search warrant was improper.

In response, the Government provides that Defendant has not shown that the affidavit in this case contains deliberate falsity or that the affidavit was made with reckless disregard for the truth. Specifically, the Government argues that the information Defendant contends is false has not been shown to be material to support a finding of probable cause.

In *Franks v. Delaware*, 438 U.S. 154 (1978), the Supreme Court held that a search warrant is void under the Fourth Amendment if the affidavit supporting the warrant contains "deliberate falsity or that the affidavit was made with reckless disregard for the truth." To challenge the veracity of a warrant affidavit, a defendant must make a preliminary showing that the affiant made intentional misstatements or

omissions that were essential to the finding of probable cause. *United States v. Burston*, 159 F.3d 1328 (11th Cir. 1998).

The Court finds that the information included in the search warrant pertaining to Defendant's prior prosecutions was intentional. However, the Court finds that the Defendant has not shown that the information pertaining to Defendant's prior prosecutions and acquittals was essential to a finding of probable cause. Defendant's counsel testified that he did not know or have any information that the magistrate relied on such statements to establish probable cause. Therefore, the inclusion of false information alone, whether deliberate or not, is insufficient to establish that such statements were material or essential to a finding of probable cause. *United States v. Reid*, 69 F.3d 1 109 (11th Cir. 1995), citing *United States v. Sims*, 845 F.2d 1564 (11th Cir. 1988). Here, the Court specifically notes that the only falsity is the opinion of Officer Funderburke as to why Defendant was acquitted. In essence, Defendant does not challenge the fact of the prior arrests, that they were drug charges, that large quantities of drugs were seized, or that Defendant was acquitted. As he is an officer of the court, it cannot be stated as a matter of law that the magistrate did not understand that an acquittal was of no importance for a finding of probable cause. Unlike a jury or lay person, it is not unreasonable, without more, to conclude that this information had no influence upon the magistrate's finding of probable cause.

II. OMISSIONS PERTAINING TO THE INFORMANTS

The Defendant argues that Kirkland did not include information in his affidavit for a search warrant about the informants' criminal background, and that the warrant was, therefore, improperly issued Defendant further argues that at least one or more informants were paid, and that Kirkland failed to include that information in his affidavit for a search warrant.

In response, the Government contends that the warrant does not fail because some of the informants had criminal records and that one of the twelve informants in the case was paid a small sum. Gov's Response to Addendum to Mot. to Suppress at 4.

A warrant affidavit violates the Fourth Amendment when it contains omissions made intentionally or with a reckless disregard for the accuracy or the affidavit. *United States v. Martin*, 615 F.2d 3 J 8, 329 (5th Cir. 1980). Intentional or reckless omissions will invalidate a warranty only if the inclusion of the omitted information or fact would have prevented a finding of probable cause. *United States v. Jenkins*, 901 F,2d 1075 (11th Cir. 1990). A warrant may still be valid where information relating to the background of an informant is omitted from an affidavit if based on the first hand character of the informant's information and with additional independent corroboration by another person. *See United States v. Haimowitz*, 705 F.2d 1549 (11 Cir. 1983).

In the present case, Kirkland admitted that he failed to include in the affidavit for the search warrant that one or more informants were paid. He further testified that he did not include in that affidavit that some of the informants had criminal backgrounds. Defendant argues that because of such omissions, the warrant issued in this matter was not based upon probable cause,

The Court finds that Defendant has not shown that the exclusion of such information was done intentionally or with reckless disregard for the truth. Kirkland testified that he did not intentionally leave out that information. Nor has Defendant shown that the exclusion or emission of that information was essential or material to the finding of probable cause. An informant's information is not simply unreliable because that informant has a criminal background or that the informant was paid. *See Osteria v. United States*, 769 F.2d 716 (11th Cir. 1985) ("There is neither guideline nor

law to cabin the decision as to which individual should be used as an informant. Common sense would indicate that useful informants do not come free of criminal history and that the quality of usefulness may depend to a degree on the depth of a person's prior criminal experience.")

III. THE TOTALITY OF THE CIRCUMSTANCES

Defendant argues that the warrant was not supported by probable cause. Particularly, the Defendant argues that the information furnished to the issuing magistrate was unreliable and that the warrant was stale.

The government argues that the affidavit supporting the search warrant provided the issuing magistrate with extensive information pertaining to the actions of Defendant in selling contraband from 106 Love Street. Additionally, the Government insists that the warrant was not stale.

The validity of a warrant *is* examined wider the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213 (1983). In determining probable cause, the issuing magistrate is to make a practical, commonsense decision of whether, under the totality of the circumstances set forth in the affidavit, there is a fair probability the contraband or evidence of a crime will be found at a particular place. *Id.* at 237. Additionally, there is no per se rule that establishes time limitations for presenting information to a magistrate; each ease must be examined based on the unique facts and circumstances. *United States v. Harris*, 20 F3d 445 (11th Cir. I1994).

In the instant matter, the Court finds that Kirkland's affidavit contained sufficient information to support the magistrate's finding of probable cause. In the instant case, Kirkland affied that he relied upon information obtained from twelve informants. He further provided in his affidavit that those informants had previously provided information leading to the arrest of others involved in illegal narcotics. Further,

Kirkland stated that the information each had personal knowledge about the Defendant. Moreover, he provided that the information given to him by each informant was consistent. According to Kirkland, the only conflicting information was they type of cocaine sold and how it was packaged.

Kirkland also states that he personally observed an informant purchase cocaine from Defendant. He further provided that CI 98509 had visited Defendant's residence fifteen times and communicated to Kirkland about the nature of Defendant's business. Seventy-two hours prior to Kirkland obtaining a search warrant in this matter CI 98509 informed Kirkland that he had witnessed Defendant sell crack cocaine.

Kirkland further relied upon information provided to him by investigator Green. By affidavit, Kirkland stated that Green communicated to him information that he had obtained from other informants. He also stated that the independently researched the Defendant's residence and vehicles at that residence, and that his research was consistent with information provided by the informants and Agent Green. Based upon the totality of the circumstances and taking into consideration factors such as reliability, veracity, corroboration, and personal knowledge, the Court finds that sufficient information was included in the affidavit for the search warrant to support a finding of probable cause.

The Court also finds that warrant was not stale. Within the seventy-two (72) hours [1] preceding the application, Kirkland

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[1] Defendant argues that the warrant was improperly executed. Specifically, Defendant contends that the warrant was signed at 2:00 p.m. Whereas, the affidavit for a search warrant was signed at 2:05 p.m. Defendant reasons that the search warrant was submitted to and signed by the magistrate. Then, subsequently, the affidavit and application were submitted and executed. The Court finds that Defendant has not proffered any evidence to support his reasoning and conclusions or to rebut the

affied that a confidential informant witnessed Defendant sell cocaine, and that the informant stated that there was a large quantity of cocaine being sold at said residence. Moreover, Kirkland stated that Defendant was engaged in an on-going narcotic business. Therefore, based upon the nature and function of the premised searched, the nature of the suspected crime, and the totality of the circumstances in this case, the Court finds that the information upon which the search warrant was issued was not stale.

CONCLUSION

For the aforementioned reasons, the Court finds that Defendant's motion to suppress, should be, and hereby is, DENIED.

SO ORDERED, this 4th day of February, 2000.

/s/ W. Louis Sands
W. LOUIS SANDS
UNITED STATED DISTRICT JUDGE

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magistrate's statement that the warrant was issued upon affidavit and oath by Kirkland. A slight variation in the times actually entered does not require a finding to the contrary.

APPENDIX E

EXHIBIT D-4

AFFIDAVIT AND APPLICATION FOR A SEARCH WARRANT IN THE MAGISTRATE COURT OF DECATUR COUNTY STATE OF GEORGIA

DOCKET NO. 195

The undersigned *Narcotics Agent David Kirkland* being duly sworn, deposes and says:

I am an officer of the State of Georgia or it's political subdivisions charged with the duty of enforcing the criminal laws, and that I have reason to believe that in *Decatur* County, Georgia, on the person, premises, or property described as follows: (state detailed description of person, property, or location). The residence of 106 Love Street Bainbridge, Decatur County, Georgia. Said residence is described as a single family dwelling constructed of brick with white trim. The residence displays the numbers "106" over the front of the house in three inch black numbers. Said residence is further described as being the first house on Love Street on the South side of Love Street traveling East after turning off West Street. The search to also include any outside buildings. (see attached photo) The persons located at said residence are Tommy Howard a b/m, 509 in height, dob of 09/11/52; Eddie Freeman b/m; Brenda Porter b/f, Dorothy Battle b/f, Nathaniel b/m. A white and blue GMC pickup, a blue Cutlass and a small white Toyota pickup. This search to also include any persons or vehicles that may be located at said residence for the purpose of furthering the on-going business of distributing illegal narcotics. The search to also include the entire curtilage of said residence.

There is now located certain instruments, articles, person (s), or items, namely:

(specify evidence, contraband, or person (s) to be searched for) A quantity of cocaine, U.S. currency derived from the sale of illegal narcotics, any weighing devices associated with narcotics, items used to trade for illegal narcotics, items used to transport illegal narcotics, bags used to package narcotics, any devices associated with the use of illegal narcotics and tin foil. Any documents showing residency, bank accounts, any documents showing drug sales, any pictures depicting drug use.

Which is in violation of (name the law being violated) The Georgia Controlled Substance Act, 16-13-30.

The facts tending to establish probable cause that a crime has been, or is being committed and the above described instruments, articles or items described above are presently located at the above described premises or property are as follows: (state in detail the facts you believe create probable cause, including statement of ownership, possession, or control, if known)

SEE ATTACHMENT A

AFFIDAVIT AND APPLICATION FOR SEARCH WARRANT

I swear or affirm that all of the information contained in the Affidavit and all other testimony given by me under oath is true to the best of my knowledge and belief.

AFFIANT: /s/ David Kirkland
DAVID KIRKLAND
TITLE: Narcotics Agent

Sworn to and subscribed to before me this 2nd day of April, 1999, at 2:05 p.m.

/s/ Phyllis Don
PHYLLIS DON
Magistrate Judge

ATTACHMENT A

Affiant, Narcotics Agent David Kirkland, is charged with enforcing the criminal laws of the State of Georgia, annotated.

The Affiant is employed by the Bainbridge Public Safety Department and has been so employed for eight years. In the month of February of 1997, Affiant was given the duties of Narcotics Agent. This assignment carried the responsibility of investigating all drug cases made in the city limits of Bainbridge, Georgia. The Affiant was also to investigate any drug related activity, including the on-going business of distributing illegal narcotics. Since then, Affiant has been involved in the arrests and prosecutions of approximately 200 drug related cases. The cases consisted of charges from conspiracy to distribute cocaine, methamphetamine and marijuana to simple possession of these same illegal narcotics. In the Affiant's more than two years of drug investigations and the number of drug related schools the Affiant has attended, the Affiant has become very familiar with the way illegal narcotics are manufactured, distributed and used.

During the year of 1997, Director of Public Safety Larry Funderburke, instructed Affiant to open an investigation of Tommy Howard of 106 Love Street Bainbridge, Decatur County, Georgia. Funderburke advised Affiant that Howard had been investigated on other occasions where large quantities of cocaine had been seized. Funderburke stated that Howard had been arrested on three occasions and had been found not guilty, because Howard would never be in the room where the narcotics were found. Affiant opened the investigation by first researching the prior cases that had been made against Howard. Affiant then interviewed the first Confidential Reliable Informant that had information on Howard on February 18, 1997 and the information continues to be relayed to the Affiant on a daily basis.

The next paragraph is a summary of statements given to the Affiant by twelve Confidential Reliable Informants about the ever-changing on-going business of distributing illegal narcotics by Tommy Howard from the residence of 106 Love Street in Bainbridge, Decatur County, Georgia. These twelve informants have all led to arrests of persons in the business of distributing illegal narcotics. They are familiar with the way illegal narcotics are manufactured, distributed, transported, used and concealed. The informants were never interviewed together, so the accounts of Howard's illegal narcotics distribution was of their own knowledge. Howard's name was never mentioned by Affiant until the informants said the name. The information then would be the same with each CI. The residence was 106 Love Street, the first house on the right after turning off West Street onto Love Street traveling East. The purchase of the illegal narcotics would occur just inside a screen door located on the front of the residence. Howard would meet the person wishing to purchase the illegal narcotics at the screen door. Depending on how well Howard knew the person would determine how far in the house the person would be allowed to go. The informants relayed information that they never knew where Howard would go to get the narcotics, but it would be in one of the rooms in the house. Each CI stated that Howard would move the narcotics on a regular basis from room to room to intervene in the investigative efforts by police. The house was often regarded to as a boarding house for persons that Howard trusted to watch over his narcotics. The only conflicting information among the informants was the type of cocaine Howard sold and how it was packaged. Some informants stated Howard only sold "crack cocaine" unwrapped or wrapped in tin-foil. Other informants stated Howard only sold powder cocaine packaged in small clear plastic ziplock bags. The informants also stated that Howard always had an endless supply of cocaine. The informants also told Affiant of a weapon that was normally kept in the first room

to the right just inside the door. The weapon was to insure that no one robbed Howard or stole the illegal narcotics. It was relayed to the Affiant that Howard's room was also very close to the bathroom.

The Affiant along with Detective Wendell Cofer attempted to introduce an under-cover agent with a CI on two different occasions. The under-cover agents were from the Georgia Bureau of Investigations. Both occasions when the under-cover would attempt to purchase the narcotics, Howard would not sell to the under-cover; however, the CI would then be allowed to go back to Howard a short period of time later to purchase narcotics for investigative purposes and at that time Howard would sell the narcotics to the CI. The agents would travel with the informants to Howard's home and would witness the CI purchase crack cocaine from Howard. The attempts to introduce the agent to Howard were unsuccessful.

Affiant also talked with Investigator Frank Green about Howard. Green advised Affiant that he had talked with several informants about Howard that basically gave the same description of Howard's narcotics distribution business. Green also told Affiant about the persons that resided at the residence, but that it changed from day to day. The persons mentioned that resided at the residence were: Dorothy Battle b/f, Eddie Freeman b/m, Brenda Porter b/f, and a subject by first name of Nathaniel "Nate".

Affiant then researched Howard's residence. The residence is listed in Paul Brinson's name. The water bill is also in Brinson's name, but is often paid by a female.

Affiant researched vehicles at said residence and Howard's truck and blue Cutlass were found at said residence on several occasions.

Affiant also noticed that Howard's residence was preceded by an empty lot, Howard's residence was next and displayed the numbers 106 over the front porch and then the next residence displayed the numbers 104 over the front porch.

Affiant enquired about the number situation at City Hall. A representative at City Hall stated it had been that way for a number of years and they did not know the reason behind this numbering on the two houses. Affiant also asked the informants that were giving the information, and they stated that Howard done this to misinform the police.

Affiant worked with CI 98059 in relation to the investigation. This CI has been at said residence fifteen times in the capacity of gathering information for this investigation within the past two months. The CI confirmed all the above information. The CI has been in said residence within the past 72 hours and witnessed Howard sale crack cocaine. The CI stated there was a large quantity of cocaine being sold at said residence.

Affiant also requests a "No-Knock" provision be signed to insure the safety of the officers serving the warrant, and to reduce the risk of the evidence being destroyed.

Affiant has supplied a sealed envelope to the Magistrate Judge with the name of the CI enclosed inside. The envelope is to opened only by a Superior Court Judge of this district.

SEARCH WARRANT

IN THE MAGISTRATE COURT OF DECATUR COUNTY STATE OF GEORGIA

DOCKET NO.195

TO: ALL PEACE OFFICERS OF THE STATE OF GEORGIA

Affidavit having been made before me by *Narcotics Agent David Kirkland* an officer charged with the duty of enforcing the Criminal Laws, that he has reason to believe that in *Decatur* County, Georgia on the following described person, premises, or property: (state detailed description of person, property or location) The residence of 106 Love Street Bainbridge, Decatur County, Georgia. Said residence is described as a single family dwelling constructed of brick with white trim. The residence displays the numbers "106" over the front of the house in three inch black numbers. Said residence is further described as being the first house on Love Street on the South side of Love Street traveling East after turning off West Street. The search to also include any outside buildings. (see attached photo) The persons located at said residence are Tommy Howard b/m, 509 in height, dob 09/11/52; Eddie Freeman b/m, Brenda Porter b/f, Dorothy Battle b/f, Nathaniel b/m. A white and blue GMC pickup, a blue Cutlass and a small white Toyota pickup. This search to also include any persons or vehicles that may be present at said residence for the sole purpose of furthering the on-going business of distributing illegal narcotics. The search to also include the entire curtilage of said residence.

There is now being located certain instruments, articles, person (s), or items, namely: (specify evidence, contraband, or person (s) to be searched for) A quantity of cocaine, U.S. currency derived from the sale of illegal narcotics, any weighing devices, items used for trade, items used to trans-

port, bags used to packaging, any instruments associated with the use of, tin foil; all of which are associated with the distribution of illegal narcotics. Any documents showing residency or ownership of property, bank accounts, any documents showing drug sales, any pictures depicting drug use.

Which is in violation of: (name the law being violated) The Georgia Controlled Substance Act, 16-13-30.

based upon the affidavit given under oath or affirmation and all other information given to me under oath or affirmation, I am satisfied that there is probable cause to believe that a crime is being committed or has been committed and that the property described above is presently located on the person, premises, or property described above.

You are hereby commanded to enter, search and seize within ten (10) days of this date, the person, premises, or property described above. A copy of this Warrant is to be left with the person searched, or if the person is not available, on the premises or vehicle searched, and a written return, including an inventory of any things seized, shall be made me or a Court of competent jurisdiction without unnecessary delay after the exexution of Search Warrant.

SO ORDERED this 2nd day of April, 1999 at 2.00 p.m.

/s/ Illegible
Judge of the Magistrate Court

Kn-Knock Provision (Not Valid Unless Signed)

IT APPEARING from the aforementioned Affidavit that there are reasonable grounds to believe that the giving of verbal notice would greatly increase the officer's peril and

(or) lead to the immediate destruction of the instruments, articles or things ordered to be seized.

IT IS, THEREFORE, ORDERED that the entry be made without knocking or the giving of verbal notice of the officer's authority and purposes.

SO ORDERED this 2nd day of April, 1999 at 2:00 p.m.

/s/ Illegible
Judge of the Magistrate Court

RETURN OF SERVICE

( ) This Search Warrant was not executed and is returned to the judicial officer who issued it.

(√) I executed this Search Warrant on the 9th day of April, 1999, at (Illegible) m. and searched the person, premises, or property described in the warrant. A copy of this warrant:

( ) Was left with _____.

( ) Was left in the following conspicuous place: _____ because no one was available to be given the warrant.

Attached hereto is an inventory consisting of _____ pages, or the instruments, articles or things which were seized pursuant to this Search Warrant. This inventory was made in the presence of _____ and I swear (affirm) that this inventory is a true and detailed account of all instruments, articles, or things seized pursuant to this Search Warrant.

_____
Affiant

Sworn and subscribed before me this _____ day of ____, 19__.

Title _____

_____